WILLKIE FARR & GALLAGHER

Three Lafayette Centre
1155 21st Street, NW
Washington, DC 20036-3384

202 328 8000
Fax: 202 887 8979

January 11, 1999

Ms. Magalie Roman Salas
Office of the Secretary
Federal Communications Commission
The Portals
445 Twelfth Street, S.W.
Washington, D.C. 20554

Re: Joint Application of AT&T Corp. and Tele-Communications, Inc. for Transfer of Control to AT&T of Licenses and Authorizations held by TCI and its Affiliates or Subsidiaries, CS Docket No. 98-178

Dear Ms. Salas:

Attached is AT&T/TCI's supplemental pleading responding to Hiawatha Broadband Communications, Inc.'s late filing. Please enter a copy of the attached into the record in this proceeding.

Sincerely,

Francis M. Buono LKS

Michael H. Hammer
Francis M. Buono

Before the

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

In the Matter of	)	
	)	
Joint Application of AT&T Corp.	)	
and Tele-Communications, Inc.	)	CS Docket No. 98-178
for Transfer of Control to AT&T	)	
of Licenses and Authorizations	)	
Held by TCI and its Affiliates	)	
or Subsidiaries	)	

OPPOSITION TO MOTION TO ACCEPT LATE-FILED PETITION TO DENY AND JOINT RESPONSE OF TELE-COMMUNICATIONS, INC. AND AT&T CORP.

TELE-COMMUNICATIONS, INC.

Stephen M. Brett
Tele-Communications, Inc.
5619 DTC Parkway
Englewood, Colorado 80111

Michael H. Hammer
Francis M. Buono
Willkie Farr & Gallagher
Three Lafayette Centre
1155 21st Street, N.W.
Suite 600
Washington, D.C. 20036-3384

AT&T CORP.

Mark C. Rosenblum
AT&T Corp.
295 North Maple Avenue
Basking Ridge, New Jersey 07920

David W. Carpenter
Mark D. Schneider
Sidley & Austin
1722 Eye Street, N.W.
Washington, D.C. 20006

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In the Matter of	)	
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or Subsidiaries	)	

OPPOSITION TO MOTION TO ACCEPT LATE-FILED PETITION TO DENY AND JOINT RESPONSE OF TELE-COMMUNICATIONS, INC. AND AT&T CORP.

AT&T Corp. ("AT&T") and Tele-Communications, Inc. ("TCI," collectively "AT&T/TCI") respectfully request that the Commission reject the motion by Hiawatha Broadband Communications, Inc. ("Hiawatha") to accept its late-filed Petition to Deny in the above-captioned proceeding.[1] Moreover, even if Hiawatha's pleading is accepted as an ex parte communication, the Commission should reject Hiawatha's proposed conditions on the AT&T/TCI merger.

I. HIAWATHA'S MOTION TO ACCEPT ITS TWO-MONTH LATE PETITION TO DENY SHOULD BE REJECTED BECAUSE HIAWATHA DOES NOT PROVIDE GOOD CAUSE FOR GRANTING ITS MOTION.

The Commission's general policy is not to accept late-filed pleadings.[2] Although the Commission may exercise discretion and accept late-filed materials in appropriate circumstances, it

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1 Motion to Accept Late-Filed Petition to Deny and Petition to Deny of Hiawatha Broadband Communications, Inc., CS Docket No. 98-178 (Dec. 30, 1998)("Hiawatha Petition").

2 See In re Sandwich Isles Communications, Inc., Order, 13 FCC Rcd. 2407, at ¶ 16 (1998).

will do so only upon a showing of "good cause" by the requesting party.[3] The Commission has previously said that in order to establish good cause, "the petitioning party must cite the intervention of something beyond the control of the party which could not have been foreseen, and for which no corrective action could have been taken."[4]

Hiawatha's motion does not specify any cause, let alone good cause, for the delay in filing its Petition to Deny.[5] The Commission advised all prospective commenters that Petitions to Deny were due at the Commission on October 29, 1998.[6] Hiawatha now seeks to file its Petition more than two full months after that date (and, in fact, over one and a half months after Reply Comments were

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3 See In re Meredith/New Heritage Strategic Partners, Memorandum Opinion & Consolidated Order, 9 FCC Rcd. 6841, at ¶ 6 (1994).

4 Id. at ¶ 10. See also In re Petition of Southwestern Bell Telephone Company under Section 69(g)(1)(ii) of the Commission's Rules for Establishment of New Service Rate Elements, Memorandum Opinion & Order, 13 FCC Rcd. 5274, at ¶ 10 (1998) (rejecting late-filed Petition to Reject or Suspend for failure to show good cause); In re Nextel Communications, Inc.: Applications for 800 MHz Specialized Mobile Radio-Trunked Systems at Various Locations, Order, 13 FCC Rcd. 281, at ¶ 6 (1998) (rejecting late-filed Petition for Reconsideration for failure to demonstrate the "existence of extraordinary circumstances justifying the late filing"); In re Falcon Cablevision: Reconsideration of Appeal of Local Rate Order of the City of Cedartown, Georgia, Memorandum Opinion & Order, 12 FCC Rcd. 4190, at ¶ 7 (1997) (rejecting late-filed Petition for failure to show good cause).

5 Hiawatha's suggestion that its motion should be accepted because its pleading "brings to the Commission's attention" relevant findings in the Commission's own recently adopted Fifth Annual Video Competition Report is ludicrous. Bringing to the Commission's attention information it obviously already knows cannot constitute the requisite good cause justification.

6 See In re Joint Application of AT&T Corp. and Tele-Communications, Inc. for Transfer of Control of AT&T of Licenses and Authorizations Held by TCI and its Affiliates or Subsidiaries, Public Notice, CS Docket No. 98-178, DA 98-1969 (rel. Sept. 29, 1998).

filed). Such a request, without any justification, and particularly given the extraordinary length of the delay,[7] flies in the face of established Commission procedures and should be summarily rejected.

This conclusion is further supported by the fact that, as Hiawatha itself notes, the proposed Petition to Deny would add nothing to the formal record in this proceeding. A few commenters have already raised the issue of exclusive program agreements in their Petitions,[8] and AT&T/TCI provided a detailed response to those concerns in their Joint Reply Comments.[9] The fact that these substantive concerns were raised by other petitioners last October only underscores the inappropriateness of Hiawatha's request to accept its late-filed Petition to Deny.

II. THE COMMISSION SHOULD NOT IMPOSE HIAWATHA'S PROPOSED CONDITION THAT TCI WAIVE THE ENFORCEMENT OF ITS EXCLUSIVE ARRANGEMENTS WITH REGIONAL SPORTS PROGRAMMERS.

Even if its pleading is accepted as an ex parte communication, the Commission should reject Hiawatha's proposed conditions on the AT&T/TCI merger. Hiawatha asks the Commission to condition approval of the merger on TCI's waiver of its exclusive agreements with all regional sports programming channels in general, and with Midwest Sports Channel in particular.[10] However, the

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7 See In re AT&T Co.: Revisions to Tariff FCC No. 12, 6 FCC Rcd. 6654 (1991) (Commission rejected Comments that were 14 days late); In re AT&T Co.: Revisions to Tariff FCC No. 12, 6 FCC Rcd. 5261 (1991) (Commission rejected Comments that were 32 days late).

8 See, e.g., Petition to Deny of Seren Innovations, Inc., CS Docket No. 98-178, at 8 (Oct. 29, 1998)("Seren Petition"); Comments of Ameritech, CS Docket No. 98-178, at 37-38 (Oct. 29, 1998).

9 See AT&T/TCI Joint Reply Comments and Joint Opposition to Petitions to Deny or to Impose Conditions, CS Docket No. 98-178, at 63-66 (Nov. 13, 1998)("AT&T/TCI Joint Reply Comments").

10 Hiawatha Petition at 8, 12.

Commission should reject this proposed condition for the very reasons set forth in AT&T/TCI's Reply Comments addressing this issue.[11]

Midwest Sports Channel clearly is not covered by the program access rules because it is not vertically integrated with any cable operator.[12] There is nothing about the merger that would justify imposing a unique restriction on AT&T/TCI's entering into exclusive arrangements with program services that are not vertically integrated and not covered by the rules.[13] This is especially true because the Commission just recently declined to consider extending the rules to non-vertically integrated services because there was not "sufficient evidence of a problem."[14]

Moreover, as AT&T/TCI explained in their Reply Comments, not only have the Commission and Congress recognized the efficiencies created by programming exclusivity, but numerous well-established, alternative MVPDs have done so as well, and are increasingly using program exclusivity as a competitive weapon against cable.[15] These competitors aggressively promote their exclusive

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11 See AT&T/TCI Joint Reply Comments at 63-66. Concerns unrelated to the merger itself, like Hiawatha's, play no role in the Commission's analysis of the AT&T/TCI transaction. See id. at 7-11.

12 See Seren Petition at 7 ("Because [Midwest Sports Channel] is not vertically-integrated, it is not covered by the existing program access statutes.").

13 In fact, the Commission has no authority to entertain conditions and restrictions unrelated to the merger. Any conditions the Commission imposes must be "necessary ... to ensure that the public interest is served by the transaction." See AT&T/TCI Joint Reply Comments at 7-11 (citation omitted). Hiawatha's proposed condition is wholly irrelevant to the transaction itself and to the Commission's evaluation of the merger pursuant to Section 310(d). Id.

14 In re Petition for Rulemaking of Ameritech New Media, Inc. Regarding Development of Competition and Diversity in Video Programming, Distribution, and Carriage, Memorandum Opinion and Order and Notice of Proposed Rulemaking, CS Docket No. 97-248, RM No. 9097, FCC 97-415, at ¶ 36 (rel. Dec. 18, 1997).

15 See AT&T/TCI Joint Reply Comments at 64-66.

arrangements, and the cable industry's lack of access to such programming, in their marketing. DIRECTV, for example, has touted its offer of sports programming "not available on cable" from every major professional league.

This competitive backdrop provides the Commission with yet another reason to reject Hiawatha's proposal to single AT&T/TCI out and inhibit its ability to compete by eliminating its right to maintain exclusivity with program services not covered by the rules.[16] Hiawatha, like Seren and Ameritech in earlier pleadings, has simply failed to support limiting AT&T/TCI's program exclusivity beyond the program access rules that apply throughout the industry.[17]

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16 Contrary to Hiawatha's suggestion, an outright ban on exclusive contracts for an entire class of programming is not at all what Congress intended. See, e.g., 47 U.S.C. § 548(c)(2)(C),(D) (permitting exclusivity under all circumstances when there is no vertical integration; and permitting exclusivity for vertically integrated programmers in served areas if found to be in the public interest).

17 Moreover, contrary to Hiawatha's assertion, Hiawatha Petition at 10, Congress did not intend to prohibit all exclusive agreements where effective competition does not exist. Rather, the level of competition in a given area was intended to be no more than one of the five factors to be considered by the Commission in determining whether an exclusive contract between a cable operator and a vertically integrated programmer is in the public interest:

> Thus, the dominance in the market of the distributor obtaining exclusivity should be considered in determining whether an exclusive arrangement amounts to an unreasonable refusal to deal. Other factors include the duration of the exclusivity, and the effect on competition or potential competition in the market.

See S. Rep. No. 92, 102d Cong. 2d Sess. 28 (1992) (emphasis added). See also 47 U.S.C. § 548(c)(4). In fact, Congress was uncertain what effect exclusive arrangements might have in a given market in the absence of effective competition, stating:

> Where there is no effective competition, however, exclusive arrangements may tend to establish a barrier to entry and inhibit the development of competition in the market.

S. Rep. No. 92, 102d Cong. 2d Sess. 28 (1992) (emphasis added). Hiawatha misquotes this sentence of the legislative history, substituting the word "will" for the word "may." See Hiawatha Petition at 10. Thus, the legislative history cited by Hiawatha in no way suggests that, in the absence of

(continued ...)

In short, given the increasingly aggressive use of exclusivity by TCI's largely non-regulated competitors, especially in securing exclusive sports programming and using these exclusive arrangements to compete for subscribers, AT&T/TCI respectfully submit that there is no sound public policy basis to justify Hiawatha's proposal to interfere in the programming market and require TCI to waive, either across-the-board or for Midwest Sports Channel alone, its bargained-for sports programming exclusivity arrangements.[18]

III. CONCLUSION

For the foregoing reasons, AT&T/TCI respectfully urge the Commission to reject the motion made by Hiawatha Broadband Communications, Inc. ("Hiawatha") to accept its late-filed Petition to Deny in the above-captioned proceeding. Moreover, even if Hiawatha's pleading is accepted as an ex parte communication, the Commission should reject Hiawatha's proposed conditions on the AT&T/TCI merger.

(... continued)

effective competition, exclusive agreements between non-vertically integrated programmers, such as Midwest Sports Channel, and cable operators, such as TCI, are prohibited.

18 Moreover, TCI has been entirely reasonable with its competitors in voluntarily relinquishing exclusivity in certain cases, even though it was under no obligation to do so under the program access rules. For example, TCI voluntarily waived its exclusive rights to the Chicago Cubs baseball games carried on CLTV, a local service in the Chicago area, which was a matter of particular interest to Ameritech. AT&T/TCI will continue to review requests to relinquish exclusivity for services not covered by the program access rules on a case-by-case basis and to act reasonably and responsibly in this area.

Respectfully submitted,

TELE-COMMUNICATIONS, INC.

Stephen M Brett LKS

Stephen M. Brett
Tele-Communications, Inc.
5619 DTC Parkway
Englewood, Colorado 80111

Michael H. Hammer LKS

Michael H. Hammer
Francis M. Buono
Willkie Farr & Gallagher
Three Lafayette Centre
1155 21st Street, N.W.
Suite 600
Washington, D.C. 20036-3384

AT&T CORP.

Mark C. Rosenblum LKS

Mark C. Rosenblum
AT&T Corp.
295 North Maple Avenue
Basking Ridge, New Jersey 07920

Mark D. Schneider LKS

David W. Carpenter
Mark D. Schneider
Sidley & Austin
1722 Eye Street, N.W.
Washington, D.C. 20006

January 11, 1999

CERTIFICATE OF SERVICE

I, Carmen D. Minor, do hereby certify that on this 11th day of January, 1999, copies of the foregoing "Opposition to Motion to Accept Late-Filed Petition to Deny and Joint Response of Tele-Communications, Inc. and AT&T Corp." were served by hand and express mail, postage prepaid, as indicated below, to the following parties:

HAND DELIVERY:

Chairman William E. Kennard
Federal Communications Commission
The Portals
445 Twelfth Street, S.W.
Suite 8B201
Washington, DC 20554

Commissioner Susan Ness
Federal Communications Commission
The Portals
445 Twelfth Street, S.W.
Suite B115
Washington, DC 20554

Commissioner Michael Powell
Federal Communications Commission
The Portals
445 Twelfth Street, S.W.
Suite 8A204
Washington, DC 20554

Commissioner Harold Furchtgott-Roth
Federal Communications Commission
The Portals
445 Twelfth Street, S.W.
Suite A8302
Washington, DC 20554

Commissioner Gloria Tristani
Federal Communications Commission
The Portals
445 Twelfth Street, S.W.
Suite 8C302
Washington, DC 20554

International Transcription Service, Inc.
1231 20th Street, N.W.
Washington, DC 20036

Deborah Lathen
Federal Communications Commission
Chief
Cable Services Bureau
2033 M Street, N.W.
Washington, DC 20554

Royce Dickens
Federal Communications Commission
Policy and Rules Division
Cable Services Bureau
2033 M Street, N.W.
Washington, DC 20554

Quyen Truong
Federal Communications Commission
Policy and Program Planning Division
Common Carrier Bureau
1919 M Street, N.W.
Room 544
Washington, DC 20554

Karl Kensinger
Federal Communications Commission
Satellite and Radio Communication Division
International Bureau
2000 M Street, N.W.
Room 800
Washington, DC 20554

Walter Strack
Federal Communications Commission
Wireless Telecommunications Bureau
2025 M Street, N.W.
Room 5002
Washington, DC 20554

Evette Keene
Federal Communications Commission
Video Services Division
Mass Media Bureau
1919 M Street, N.W.
Room 712
Washington, DC 20554

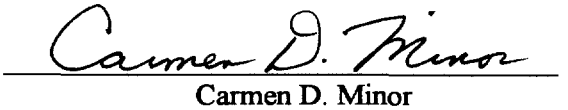
Sherille Ismail
Federal Communications Commission
Telecommunications Division
International Bureau
2000 M Street, N.W.
Room 800
Washington, DC 20554

Adrian Herbst
James Baller
Sean Stokes
THE BALLER HERBST LAW GROUP, P.C.
1820 Jefferson Place, N.W.
Suite 200
Washington, DC 20036

Counsel for Hiawatha Broadband
Communications, Inc.

EXPRESS MAIL:

Kent A. Gernander
Hiawatha Broadband Communications, Inc.
64 East Fourth Street
P.O. Box 310
Winona, MN 55987



Carmen D. Minor